UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

E.I. Du Pont De Nemours and Company,
Louisville Works,

and 09-CA-040777
09-CA-041634

Paper, Allied-Industrial, Chemical and
Energy Workers International Union
and its Local 5-2002

E.I. Du Pont De Nemours and Company,

and 04-CA-0033620

United Steel, Paper and Forestry, Rubber
Manufacturing, Energy, Allied Industrial
and Service Workers International Union
(USW) and its Local 4-76

RESPONDENT'S OPPOSITION TO THE CHARGING PARTIES' MOTION FOR RECONSIDERATION

In their Motion for Reconsideration, Local 5-2005 and Local 4-786 of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (collectively, "the Union"), claim that the Board's decision in this case should be vacated because its fails to apply the legal standard set forth in *Raytheon Network Centric Systems,* 365 NLRB No. 161 (Dec. 15, 2017). The Union's Motion should be rejected for at least two reasons.

First, the Union's Motion should be denied because it seeks to raise a new legal theory, one that was never pursued either by the General Counsel or the Union. For almost 15 years, the

General Counsel and Union litigated this case based on a "unilateral change" theory before two administrative law judges, before the Board twice, and on appeal to the U.S. Court of Appeals for the District of Columbia Circuit twice. Now the Union seeks to advance a brand new legal theory based on an alleged "refusal to bargain upon request." This newly-minted theory of violation was never presented to the Board or the court. Indeed in 2016, former Board Member Philip Miscimarra expressly noted, without contradiction, that this case has been litigated solely under a *Katz* "unilateral change" theory, rather than a general refusal-to-bargain upon request theory. *See E.I. Du Pont De Nemours*, 364 NLRB No. 113, slip op at 27-28 (2016). Having litigated and lost, the Union cannot advance a new legal theory, post-litigation, in the hopes of achieving a better result. The Union's Motion should be denied on this basis alone.

Second, the Board's decision in this case is fully consistent with its decision in *Raytheon.* As an initial matter, the Board in *Raytheon* did not consider the general refusal to bargain theory of violation advanced now advanced by the Union precisely because there, as here, the case "was litigated solely under a *Katz* 'unilateral change' theory." 365 NLRB Slip op. at 19, n. 88. Further, by implementing the changes to its BeneFlex benefit plan, DuPont maintained the status quo, as required under *Katz*, while continuing to bargain in good faith with the Union for a successor contract at both Louisville and Edgemoor. By implementing the BeneFlex changes at issue, DuPont continued to treat union employees at Louisville and Edgemoor in the same fashion as all others who participated in the BeneFlex Plan, both union and union alike, as it had done for more than a decade. Simply stated, DuPont and the Union continued to receive the benefit of their long-standing bargain while they negotiated for new agreements. To do anything else would have been a violation of the status quo and would have been inconsistent with the principles set forth in *Raytheon*.

II. STATEMENT OF FACTS

A. The Union Alleged, and the General Counsel Pursued Litigation Based on, a Unilateral Change Theory at Both Louisville and Edgemoor.

The parties' collective bargaining agreements expired in March 2003 at Louisville and expired in March 2004 at Edgemoor. *See* 364 NLRB slip op at 2. After contract expiration and while the parties were bargaining for a successor contract, DuPont continued its longstanding practice of announcing changes to the BeneFlex Plan that would go into effect for all employees nationwide on January 1 of the following year. *Id*. The Union objected to the announced changes in October 2003 and October 2004, respectively. On January 1, 2004 and January 1, 2005, DuPont implemented the announced changes, without bargaining to impasse or agreement, consistent with its decade long past practice of similar changes. *Id*., slip op. at 2, n.5. The parties continued bargaining for a new contract thereafter following implementation of the changes, which included bargaining over employee health care.

The Union filed three unfair labor practice charges, two in Louisville in early January of 2004 and 2005, respectively, and one in Edgemoor in January 2005. *See* Union charges GC Exhs. 1(a) and 1(e) (Louisville) and GC Ex. 1 (Edgemoor). Each of the charges is virtually identical, each alleging that beginning on January 1 of each year, DuPont violated Section 8(a)(5) of the Act "when it unilaterally implemented changes to the health benefit plan in effect for unit employees." *Id.* The General Counsel issued Complaint on each of the Union's charges, adopting the Union's unilateral change theory. For example, the Louisville Complaint alleges that DuPont violated Sections 8(a)(1) and (5) of the Act when it "implemented changes to its BeneFlex" plan effective on January 1, 2004 and January 1, 2005. *See* GC Ex. 1(v) (Louisville). The General Counsel and the Union pursued litigation for almost 15 years based **solely** on that unilateral change theory. Both of the administrative law judges ("ALJs") who heard the cases

recognized as much. Specifically, ALJ Karl Buschmann noted correctly that the Louisville Complaint alleged the DuPont "violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) "by implementing changes to its Beneflex" Plan. 355 NLRB 1084, 1091. After hearing the parties' arguments and assessing the evidence, ALJ Buschmann concluded that DuPont's "unilateral changes to the BeneFlex Plan following expiration of the collective-bargaining agreement did not violate Section 8(a)(5) of the Act, because the conduct [*i.e*., the implementation of the changes] was consistent with a lawful, established past practice." *Id.* at 1095. In reaching that conclusion, ALJ Buschmann relied on the Board's decisions in *Courier-Journal,* 342 NLRB 1092 (2004) and *Courier-Journal*, 342 NLRB 1148 (2004), both of which – like *Raytheon* – were litigated based on a unilateral change theory.

Similarly, ALJ Paul Bogas expressly noted that the parties' arguments at trial, their briefs, and their presentation of evidence all focused on whether DuPont violated the Act by "making unilateral changes during negotiations for a collective-bargaining agreement." 355 NLRB 1096, 1103, n. 12. ALJ Bogas found *Courier-Journal* inapposite and concluded that DuPont "violated Section 8(a)(5) and (1) of the Act ***by unilaterally implementing changes*** to the benefits of unit employees at a time when the parties were engaged in negotiations for a collective-bargaining agreement and the parties had not reached impasse." *Id.* at 1108 (emphasis added).

The Board also addressed the nature of the alleged violation. The Board in the Louisville case specifically stated: "The issue presented is whether the Respondent, E.I. DuPont De Nemours, Louisville Works, violated Section 8(a)(5) by unilaterally changing the terms of employees' benefit plan at a time when the parties were negotiating for a collective-bargaining agreement and were not at impasse. 355 NLRB at 1084. With regard to the Edgemoor litigation,

the Board described the issue in dispute as whether "Respondent's unilateral changes to its benefits plan violated Section 8(a)(5) and (1)" or "were simply a continuation of its past practice" and lawful under *Courier-Journal*. 355 NLRB at 1096. The Board's initial decisions (collectively "*DuPont I*"), issued in 2010, concluded that DuPont's reliance on *Courier-Journal* was misplaced, and that DuPont violated the Act by implementing changes to its BeneFlex plan on January 1, 2004 and 2005, respectively. Neither Board decision addressed a "refusal to bargain" theory, nor should they have – the General Counsel and the Union did not advance that theory, and the parties did not litigate that theory.

DuPont appealed both decisions to the U.S. Court of Appeals for the District of Columbia Circuit, and the court consolidated the two cases. In 2012, the D.C. Circuit refused to enforce the Board's decisions, finding that the Board had deviated from precedent without justification or explanation. *See E.I. Du Pont De Nemours and Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012). Accordingly, the D.C. Circuit remanded the case to the Board with the specific instruction to either conform to prior precedent, as reflected in cases such as *Courier-Journal, Capitol Ford*, 343 NLRB 1058 (2004) and *Beverly Health & Rehabilitation Servs*., 356 NLRB 1319 (2006), or explain its return to the rule it followed in earlier decisions such as *Register-Guard*, 339 NLRB 353 (2003). In October 2012, the Board accepted the remand. Approximately four years later, in October 2016, the Board issued a second decision ("*DuPont II*") which overruled the *Courier-Journal, Capitol Ford* and *Beverly* decisions, and concluded, once again, that DuPont violated the Act by "unilaterally changing the terms of the BeneFlex Plan." 364 NLRB No. 113, slip op. at 12.

Board Member Miscimarra filed a dissent explaining in detail why the Board's decision in *DuPont II* was in error. In his dissent, Member Miscimarra noted that there was some

evidence in the record suggesting that the Union had requested bargaining over the BeneFlex changes at Louisville, and that the DuPont refused to engage in such bargaining. *Id.* at 27. He further stated that, although the record in the Louisville case might support the existence of a refusal-to-bargain violation, the case had been litigated solely on a unilateral change theory, and, as a result, there was no general refusal-to-bargain violation before the Board. *Id*., slip op. at 27-28.

DuPont appealed the Board's decision in *DuPont II* to the D.C. Circuit in 2016. Neither the Union nor the General Counsel raised the "refusal to bargain" theory now advanced by the Union in the briefs they filed with the D.C. Circuit. Rather, the General Counsel and Union continued to argue that DuPont violated Section 8(a)(5) by implementing 2004 and 2005 BeneFlex changes unilaterally because the changes at issue involved the use of some discretion by DuPont.

The Board issued its decision in *Raytheon* on December 15, 2017, while the appeal in this case was pending at the court of appeals. Recognizing that the position it was advancing on appeal was inconsistent with the Board's *Raytheon* decision, the General Counsel filed a motion with the court seeking a remand. The court granted the General Counsel's motion and the case was remanded back to the Board in early 2018. On October 11, 2018, the Board issued a new decision, *E.I. Du Pont De Nemours*, 367 NLRB No. 12 (Oct. 11, 2018) ("*DuPont III*"). The Board in *DuPont III* stated: "The issue has remained the same throughout this litigation: whether [DuPont] violated Section 8(a)(5) and (1) of the [Act] by implementing annual unilateral changes to unit employees benefits after expiration of collective-bargaining agreements (CBAs) that contained a reservation of rights provision permitting widespread and varied unilateral

changes." *Id.* (emphasis added). The Board in *DuPont III* held that its decision in *DuPont II* had been wrongly decided and dismissed the complaints as to both Louisville and Edgemoor.

III. ARGUMENT

A. The Union's Motion for Reconsideration Should Be Rejected Because the Union Cannot Change its Legal Theory at This Stage of the Litigation.

It is axiomatic that a "Respondent should not be expected to defend against other theories that are not part of the General Counsel's case." *Sierra Bullets, LLC*, 340 NLRB 242, 242–243 (2003) (reversing the ALJ's finding of a violation of Section 8(a)(5) because the theory upon which the violation rested was not one the General Counsel pursued in litigation); *see also Citi Trends, Inc.*, 363 NLRB No. 74, slip op. at 1, 2015 (reversing ALJ decision "[b]ecause the General Counsel did not litigate this theory of a violation before the judge"); *Lamar Advertising of Hartford,* 343 NLRB 261, 265 (2004) (the General Counsel cannot "change theories midstream without giving respondents reasonable notice of the change"). The record in this case shows that the General Counsel (and Union) pursued a theory of violation based solely upon the allegation that DuPont violated the Act by *implementing* changes to BeneFlex unilaterally on January 1 of the relevant years, not on a general "refusal to bargain upon request" theory that the Union now advances for the first time.

As noted above, the Union pursued a unilateral change theory from the very outset of this litigation and has remained steadfast in pursuing only that theory of violation. The Union's unfair labor practice charges allege: "Since on or about January 1" of 2004 and 2005, DuPont "violated Section 8(a)(5)" of the Act "**when it unilaterally implemented changes** to the health benefit plan in effect for unit employees." Moreover, all three charges claim that the alleged violation took place on or after January 1 of the relevant years – the date the BeneFlex changes were implemented. None of the charges alleges that the violation occurred months earlier, in

October, the period when the Union now claims DuPont rejected its request to bargain over the BeneFlex changes at issue.

The record further confirms that both the Union and General Counsel strictly adhered to their unilateral change theory – not a general refusal-to-bargain upon request theory – throughout more than a dozen years of litigation. As ALJ Buschmann noted, the Complaint in Louisville alleges that DuPont violated the act "by implementing changes to its BeneFlex" plan. Based on the evidenced adduced in support of that theory, ALJ Buschmann found that DuPont's "unilateral changes to the BeneFlex Plan" did not violate the Act because the changes were "consistent with a lawful established past practice." ALJ Bogas considered the same legal theory, but reached a different conclusion, finding that DuPont violated the Act "by unilaterally implementing changes" to BeneFlex. Neither ALJ Buschmann nor ALJ Bogas addressed any claim that DuPont violated the Act by refusing to bargain in response to the Union's request in October of 2003 or 2004, nor should they have, given that neither the General Counsel nor the Union advanced such a theory. Indeed, as noted above, ALJ Bogas specifically stated that the parties' arguments at trial, their briefs, and the presentation of evidence all focused on a unilateral change theory. 355 NLRB 1096, 1103, n. 12. The Board has likewise recognized, both in 2010 and again on remand in 2016, that the alleged violation is based solely on a unilateral change theory under *Katz*.

In its Motion, the Union quotes various portions of Member Miscimarra's dissent in *DuPont I*, and claims that Member Miscimarra "mistakenly" believed that "the D.C. Circuit's remand [wa]s limited to the Board's treatment of what constitutes a unilateral change under *Katz*," and, on that basis, he mistakenly determined that a general "refusal-to-bargain violation" was not before the Board. *See* Motion at p. 7, n.2. The Union's argument is disingenuous in that

it conveniently ignores the operative part of the passage the Union quotes. Member Miscimarra stated explicitly that the Board did not address the general "refusal-to-bargain upon request" theory the Union now espouses because "this case was litigated solely on [the] basis" of a unilateral change theory. 364 NLRB No. 113, slip op. at 27-28. And Member Miscimarra did not misconstrue the scope of the remand. Indeed, as the Board recently recognized, the D.C. Circuit remanded the cases with a specific direction that the Board "conform to its precedent in *Capital Ford* and in the 2006 iteration of *Beverly Health and Rehabilitation Services* or explain its return to the rule it followed in earlier decisions." 367 NLRB No. 12 (Oct. 11, 2018), quoting, *E.I. du Pont de Nemours & Co. v.* NLRB, 682 F.3d 65, 69 (D.C. Cir. 2016). The remand was limited, as a practical matter, to consideration of the unilateral change theory under *Katz,* because that was the theory of violation that was pursued in *DuPont II* (as well as *DuPont I*). Notably, while the Board majority penned a detailed response to Member Miscimarra's dissent in *DuPont II*, it did not (and could not) contest Member Miscimarra's observation that the General Counsel's theory of violation was based solely upon a unilateral change theory.

In short, the Union advanced, and the General Counsel and the Union litigated, a unilateral change theory of violation for more than a dozen years; it is simply too late to adopt and pursue a new, post-litigation legal theory. *See Springfield Day Nursery,* 362 NLRB No. 30, slip op. at 2 (reversing ALJ decision where theory of the 8(a)(5) allegation was neither alleged in the complaint, nor litigated at the hearing); *Lamar*, 343 NLRB 261, 265 (2004) (the General Counsel cannot "expand the theory of the violation beyond what was alleged in the complaint and litigated at the hearing"); *Pepsi Bottling Group, Inc.,* 338 NLRB 1123, 1234 (2003) ("It is well established that a violation of the Act cannot be properly found where the violation was not alleged in the complaint and the issue was not fully litigated at the hearing") (citations omitted);

see also Independent Elec. Contractors v. NLRB, 720 F.3d 545, 552 (5th Cir. 2013) ("the Board has recognized that when the General Counsel has chosen to litigate against a respondent on a narrow theory of liability, and the respondent was led to believe that it would not have to defend on a broader theory, an ALJ is not free to resolve the case on a broader theory").

B. The Board's Decision Is Fully Consistent with *Raytheon.*

The Union's Motion should also be denied because the Board's decision in this case is fully in keeping with the legal principles set forth in *Raytheon*.[1] As an initial matter, and somewhat ironically, the Board in *Raytheon* did not consider the general refusal-to-bargain theory of violation of the type now advanced by the Union here because *Raytheon* "was litigated solely under a *Katz* 'unilateral change' theory." 365 NLRB Slip op. at 19, n. 88.

Further, the record shows that DuPont's implementation of the BeneFlex changes at issue was consistent with both *Katz* and *Raytheon* because the changes maintained the status quo while the parties continued to bargain for a new contract. As the Board correctly noted, to prevent employers from doing precisely what they have done in the past until *everything* is resolved in contract negotiations. . . . is contrary to *Katz* and to the Board's obligation to foster stable labor relations." *Raytheon,* 364 NLRB No. 161, slip op. at 11. By implementing the BeneFlex changes at issue, DuPont continued to treat union employees at Louisville and Edgemoor in the same fashion as all other BeneFlex participants nationwide, thus maintaining the status quo and preserving benefit of the bargain the parties struck a decade earlier. As Member Kaplan suggested in his concurring opinion in *Raytheon*, an employer like DuPont that allows union represented employees to participate in a corporate-wide healthcare plan and that provides the

[1] Notably, in her dissenting opinion in *DuPont III,* Board Member McFerran agreed with DuPont's position that "the *Raytheon* decision necessarily controls this case," and as applied, requires dismissal of the Union's complaints. 367 NLRB No. 12, slip op at 3-4.

same benefits to union and non-union employees alike, would violate the Act if it froze benefits for union represented employees upon expiration of a collective bargaining agreement, while modifying the plan for all other employees. *Id*., slip op at 21.

The Union's reliance on DuPont's alternative "*Stone Container* defense" misses the mark in several respects. First, the so-called *Stone Container* exception only applies, if at all, when an employer seeks to make a change that is *inconsistent* with the established status quo. The *Stone Container* exception does not come into play, where, as here, the unilateral actions at issue are fully consistent with established past practice and thus do not constitute a "change" in terms and conditions of employment under *Katz*. Indeed, the *Stone Container* decision makes no reference to *Katz* and does not discuss any of the unilateral change cases that have been at the heart of the parties' dispute – i.e., the *Courier-Journal*, *Shell Oil*, 149 NLRB 283 (1964), *Capital Ford*, 343 NLRB 1058 (2004), and *Beverly Health & Rehabilitation Servs.,* 346 NLRB 1319 (2006) line of cases on the one hand and the Register-Guard, 339 NLRB 353 (2003) and *Beverly Health & Rehabilitation Servs*., 335 NLRB 635 (2001) cases on the other.[2]

Second, DuPont has consistently defended its actions at both Louisville and Edgemoor on the grounds that the Union in both locations expressly agreed to be bound by all of the BeneFlex Plan documents, including the reservation of rights provisions contained in the Plan documents, which gave DuPont the contractual right to make the 2004-2005 BeneFlex changes at issue. That position is fully consistent the evidence cited in the Union's Motion, which notes that DuPont reminded the Union at Louisville that the "Union agreed" to the BeneFlex Plan language – including the BeneFlex reservation of rights language – which allowed DuPont to modify

[2] The *Stone Container* exception also is not relevant to this dispute because "it applies only where the parties are negotiating for an initial collective bargaining agreement and not to negotiations for successor contracts." 364 NLRB No. 113, slip op at 1, citing *Oak Hill*, 360 NLRB No. 55, slip op. at 52 (2014).

BeneFlex unilaterally. The evidence the Union cites relates to the "covered by contract" defense DuPont raised in the litigation, citing cases such as *Enloe Med. Ctr.,* 433 F.3d 834, 839 (D.C. Cir. 2005); *Dep't of Navy v. FLRA,* 962 F.2d 48, 57 (D.C. Cir. 1992); *Heartland Plymouth Court MI, LLC, v. NLRB*, 650 Fed. Appx. 11 (D.C. Cir. 2016), rather than the *Stone Container* exception. That defense is separate from the core defense raised by DuPont and the defense credited in *DuPont III*.

Third, as the Board stated in *Raytheon,* while an "employer is required to bargain with the union upon request over the mandatory subject of bargaining at issue in actions being taken unilaterally – indeed, over those very actions . . . ***the employer may still act unilaterally***." 365 NLRB No. 133, slip op. at 19 (emphasis added). Said differently, even where an employer has a duty to bargain over a particular mandatory subject upon request, that employer may still act unilaterally, before agreement or impasse is reached, if the unilateral action to be taken is consistent with establish past practice and therefore does not constitute a "change" to the status quo under *Katz*. Details of the negotiations regarding Edgemoor demonstrate that is precisely what occurred in this case. The record shows that DuPont made a contract proposal in the summer of 2004 regarding BeneFlex that, if accepted, would have addressed DuPont's right to implement the 2005 BeneFlex changes at issue. *See* Joint Exh. 1A, Edgemoor Stipulated Facts, at ¶¶ 43-48. The Union rejected DuPont's proposal. *Id*. On November 16, 2014, the Union made a proposal, stating that it would agree to the announced 2005 BeneFlex changes, if DuPont agreed to withdraw its prior BeneFlex proposal and if it agreed to the Union's proposal that day. *Id*. at ¶¶ 55-57. DuPont rejected the Union's proposal. *Id.* The parties failed to reach agreement by January 1, and DuPont implemented the 2005 BeneFlex changes for all employees

nationwide, including represented employees at Edgemoor and Louisville, maintaining the dynamic status quo under *Katz*. *Id*. at ¶¶ 58-59.

III. CONCLUSION

For the reasons set forth above, the Board should deny the Charging Parties' Motion for Reconsideration.

Respectfully submitted

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December 21, 2018

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2018, the foregoing Respondent's Opposition to Charging Parties' Motion for Reconsideration was electronically filed via the NLRB E-Filing System with the National Labor Relations Board and served by electronic mail on the following:

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